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No. 99-341

In the

Supreme Court of the United States

October Term, 1998

SIGNET BANK/VIRGINIA, a Virginia corporation,
CAPITAL ONE BANK, a Virginia corporation,
and DOES 2-100,

Petitioners

vs.

WILLIAM YU and DARLENE YU, individually and
on behalf of others similarly situated,

Respondents

On Petition for a Writ of Certiorari
To the Court of Appeal for the State of California,
First Appellate District

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court has jurisdiction under 28 U.S.C. § 1257 when no final judgment has been entered by the California Court of Appeal which reversed the grant of summary judgment and remanded for further proceedings.

2. Whether the California Court of Appeal correctly concluded as a matter of federal law that personal jurisdiction may be collaterally attacked in a judicial forum which did not enter the default judgment.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The Judgment of the Court of Appeal was entered on February 16, 1999. (App. at 1).[1] The Court of Appeal reversed the trial court's grant of summary judgment for Petitioners on two causes of action. It affirmed as to all other causes of action. (App. at 29). The Court of Appeal denied Petitioners' Petition for Rehearing on March 16, 1999. (App. at 31). The California Supreme

[1] All references to the California Court of Appeal's Opinion are to the Appendix ("App.") to the Petition for a Writ of Certiorari.

Court denied Petitioners' Petition for Review on May 26, 1999. This Court lacks jurisdiction under 28 U.S.C. § 1257 because the Judgment of the Court of Appeal is not a final judgment.

COUNTER-STATEMENT OF THE CASE

William and Darlene Yu are California residents. Petitioners Capital One and Signet Bank are Virginia corporations with their principal places of business in Virginia. In 1989, the Yus received an unrequested "pre- approved" solicitation by mail from Signet Bank/Virginia ("Signet"), inviting and encouraging them to accept a credit card from the Bank. The Yus accepted the offer by signing a brief, pre-printed acceptance form in California, and returned it in the mail. The Yus received the credit card in the mail in California and used it for personal, family and household purposes. It is undisputed that the Yus never lived or worked in Virginia, never met with a Signet representative in Virginia at any time for any reason, and never used the card in Virginia. They used the card for only one year.

Signet developed a written "long-arm program" to deal with out-of-state debtors who, Signet contended, owed it money from credit card accounts. This "long-arm program," originated in 1983, and carried on by Capital One from March, 1995, after a "spin-off" of Signet's credit card operations to Capital One, was designed to obtain default judgments against cardholders across the country, knowing that the vast majority could not, or would not, object to jurisdiction or make an appearance in the Virginia action. More than 90% of Petitioners' "long-arm" actions resulted in a default judgment against the out-of-state consumer cardholder. When a lawsuit was filed in Virginia, Petitioners mailed what they called a "change of jurisdiction letter" to the out-of-state cardholder. The letter advised the cardholder that "[w]e intend to file suit against you in Virginia," and that "[i]f you would prefer the trial to be in your state, we must receive written notice from you within twenty-one days of this letter." If the cardholder requested a change of jurisdiction within the time limit, Petitioners dismissed the Virginia action. Out-of-state cardholders who indicated they

could not appear in court for "lack of money; too far to travel; etc." were not considered by Petitioners to have made a valid request for change of jurisdiction, and Virginia suits would proceed to judgment against those customers, generally (almost always) by default.

Petitioners' documents and testimony demonstrated that they knew the Virginia court could not properly exercise personal jurisdiction over out-of-state cardholders and that, as a result, their "long-arm program" was at best suspect, and at worst obviously illegal. In 1990, years prior to the commencement of the action by the Yus in this case, a Georgia court of appeals issued a decision specifically concluding that Signet's "long-arm" practices violated the due process rights of out-of-state cardholders, and that the resulting default judgments were therefore void and unenforceable. *Signet Bank/Virginia v. Tillis*, 196 Ga. App. 433, 436, 396 S.E.2d 54, 57 (1990). The Georgia Supreme Court denied review. Signet immediately discontinued its practice of seeking the entry of judgment in the debtor's state of residence based upon the sister state default judgments entered in Virginia. It made no other changes to its "long-arm program" in response to *Tillis*.

Petitioners' written collection guidelines listed "[p]eople in the limelight, celebrities, attorneys" among the cardholders who were "not candidates for Legal Action." A Capital One vice president testified in deposition that suing out-of-state attorneys was regarded as "a bad business decision." With respect to "celebrities," he testified, "We didn't want to expose the company to any press because we hadn't done everything we needed to do." "Class action risk" was listed among the "real and assumed cost[s]" of the "long- arm program" in 1994. "Signet needs to realize the potential risk of a class action suit," the document stated, "and to do the right thing in order to prevent a future loss to the bank." In short, Petitioners took many steps affirmatively to conceal their unconstitutional process from any review.

In 1990, Signet ceased mailing statements to the Yus. The Yus' last payment on the account was made by mail from

California in May, 1990, in response to the last statement they received from Signet. More than four years later, in August, 1994, the Yus received a document in the mail from Signet entitled "Warrant in Debt." The Yus did not understand the nature or legal effect of the document, and did not respond. In October, 1994, the Yus received another document from Signet entitled "Garnishment Summons." Again, they did not understand the nature or legal effect of the document, and did not know what to do in response.

Unbeknownst to the Yus, the "Warrant in Debt" was, in fact, the functional equivalent of a summons and complaint filed against them in the municipal court of Richmond, Virginia by Signet, seeking a judgment for the allegedly unpaid balance of the Yus's credit card debt. Although the Yus received a copy of the Warrant in Debt by mail, formal service of process was effected by service on the "Secretary of the Commonwealth" of Virginia because the Yus were "non-residents." When the Yus failed to appear and defend the action, Signet procured a default judgment against them. Signet then obtained a "Garnishment Summons," issued by the Virginia municipal court, and served it on a Virginia branch office of Mr. Yu's corporate employer, Silicon Graphics, with instructions to forward the Summons to the company's headquarters in Mountain View, California, where Mr. Yu was employed. Commencing in November, 1994, Signet garnished William Yu's wages, in California, in increments of approximately $300 every two weeks, for approximately six months, until it had seized a total of almost $4,000. Signet never attempted to domesticate the Virginia default judgment in California under the procedures set forth in the Sister State Money Judgment Act, California Code of Civil Procedure § 1710.10, *et seq.*

Shortly after the instant action was filed, in the fall of 1995, Petitioners terminated their "long-arm program" altogether, and issued a written internal policy that long-arm default judgments and garnishment proceedings based on those judgments could no longer be used as leverage in collection activities.

During the four-year period immediately preceding the filing of this action, Petitioners obtained at least 7,575 judgments in Virginia municipal courts against at least 8,812 California consumer cardholders. By their own estimate, Petitioners collected at least $3.5 million from California consumer cardholders during this four- year period after a "long-arm" judgment had been entered in Virginia municipal courts against them.

In June, 1995, the Yus brought a proposed class action in California state court seeking damages and injunctive relief against Petitioners for subjecting California consumer credit card holders to suit in Virginia. The premise of each claim was that the Virginia courts lack personal jurisdiction and Petitioners had acted unconstitutionally in obtaining default judgments and extracting money through the resulting garnishment proceedings.

In December, 1996, Petitioners moved for summary judgment claiming that the Yus' affirmative suit was a collateral attack upon a final judgment of a Sister State and was impermissible under the full faith and credit clause. The trial court granted summary judgment to Petitioners. (App. at 6-7).

In February, 1999, the California Court of Appeal entered judgment reversing the trial court with respect to the Yus' causes of action for abuse of process and for alleged acts of unfair competition under California Business and Professions Code § 17200, *et seq.* The court held that the Yus could collaterally attack Virginia's default judgment against them for lack of personal jurisdiction because they had no "minimum contacts" with Virginia and "it was fundamentally unfair to expect them to travel thousands of miles to litigate matters concerning their account." (App. at 13).

REASONS FOR DENYING THE WRIT

First, this Court lacks jurisdiction under 28 U.S.C. § 1257. That statute requires the issuance of a "final judgment."

> To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; and must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945).
>
> *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 118 S.Ct. 481, 485-86 (1997).

The Court of Appeal's decision was interlocutory because it concluded only that the grant of summary judgment by the trial court as to two causes of action was subject to reversal. As a result of its Judgment, the case has been remanded to the trial court for trial of those issues. Nor does this case come within the "limited set of situations in which [the Court] ha[s] found finality as to the federal issue despite the ordering of further proceedings in the lower state courts." *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975).

Second, Petitioners have demonstrated no provision of Rule 10 of this Court which would augur in favor of review. Petitioners identify no conflicting case from any other state or from a United States Court of Appeals. Although they terminated the "long arm" program four years ago, shortly after this lawsuit was filed, Petitioners continue to raise the unsupported specter of "quantities of litigation that will further destabilize Sister State judgments, unless this Court grants *certiorari* to stem the flow and to bring California back into the full faith and credit fold." Petition at 5. The Court of Appeal correctly noted, "[t]here is no

authority under the full faith and credit clause for [any] proposed limitation on sister states' ability to examine each other's jurisdiction to render a judgment. Where a sister state's personal jurisdiction is challenged, 'an inquiry can always be made into the subject matter and personal jurisdiction of the rendering court'" (App. at 22), *citing Underwriters Nat'l Assur. v. N.C. Life and Acc.*, 455 U.S. 691, 705 (1982). *See also Burnham v. Superior Court*, 495 U.S. 604, 609 (1990); *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *Pennoyer v. Neff*, 95 U.S. 714, 732 (1877).

The refusal by the Court of Appeal to adopt reflexively the judgment of the Virginia court was premised not only on centuries of jurisprudence from this Court, but upon Virginia's own understanding of the full faith and credit clause as well. The California court's partial reversal of summary judgment on the largely undisputed factual record before it presents no decision of an important federal question that in any way conflicts with the decision of any other court or that should be revisited by this Court.

I. THE COURT OF APPEAL'S PARTIAL REVERSAL OF SUMMARY JUDGMENT AND REMAND FOR FURTHER PROCEEDINGS DOES NOT CONSTITUTE A FINAL JUDGMENT UNDER 28 U.S.C. § 1257.

Since enactment of the Judiciary Act of 1789, the jurisdiction of this Court to review federal questions made by state courts has been limited to cases in which the state's judgment is final. The applicable statute regarding the Court's jurisdiction to review state court decisions is 28 U.S.C. § 1257(a). It provides as follows:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or a statute of the United States is drawn in question or

> where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, rank, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

This statute has been held to establish a firm final judgment rule. As this Court recently made clear in *Jefferson v. City of Tarrant, Ala., supra,* a state court judgment must be "final" in two senses to be reviewable by this Court. "It must be subject to no further review or correction in any other state tribunal and it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." 118 S.Ct. at 485-86. In cases such as the instant one, where the judgment of a state court remands a case for trial, "its decision is not final 'as an effective determination of the litigation.'" *O'Dell v. Espinoza,* 456 U.S. 430 (1982) *(per curiam), cited with approval in Jefferson, supra,* 118 S.Ct. at 486. The denial of summary judgment, or the reversal of summary judgment and remand for trial, does not constitute a "final" judgment of a state court that is subject to this Court's review.

Nor does this case come within any of the exceptions to the finality doctrine discussed in *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. 469. Those exceptions include: (1) those cases in which there are further proceedings but the federal issue was conclusive, or the outcome of further proceedings is pre- ordained; (2) cases in which the federal issue will survive and require decision, regardless of the outcome of future state proceedings; (3) cases in which the federal claim has been finally decided, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case; and (4) cases in which the federal issue has been finally decided in the state courts, with further proceedings pending, if a refusal immediately to review the state court decision might seriously erode federal policy. *Cox, supra,*

420 U.S. at 479-85; *see also* Stern, Gressman, Shapiro and Geller, *Supreme Court Practice*, at 102-103 (7th ed. 1993).

Jefferson is dispositive of the Petition in this case because in both cases the state court resolved a federal question and remanded the case for trial of the remaining claims. As in *Jefferson*, none of the *Cox* exceptions is present here. This is clearly not a case in which the federal issue is conclusive or the outcome of further proceedings pre-ordained. (*Cox* exception one.) The decision on the federal issue merely permits the Respondents to proceed to resolve their abuse of process state tort claim. Nor is this a case in which the federal issue will survive and require decision, regardless of the outcome of future state court proceedings. (*Cox* exception two.) On the contrary, this case specifically fits within the rationale of *Jefferson* that resolution of the state law claims could moot the federal law question raised in the Petition.

In order to prevail on their state law claims, Respondents will have to convince the trier of fact that they are entitled to judgment for either abuse of process or violation of California's Unfair Competition Law, Business and Professions Code § 17200, *et seq.*, or both. Should they fail to do so on either factual or state law grounds, the case will be at an end, mooting the federal law question. Should Respondents prevail at trial and on any state court appeal that may be had, Petitioners will be free to raise their federal question issues in a subsequent petition to this Court if the issue survives the state court process. *Jefferson, supra*, 118 S.Ct. at 486.

The third *Cox* exception is equally inapplicable. The abuse of process claim necessarily includes an allegation that Petitioners obtained judgments that were void for want of jurisdiction. Petitioners will be able to have this claim reviewed if it survives the trial and state appellate process. *Id.* Lastly, the fourth exception is inapposite because there has been no final decision on the federal issue in the California courts. There is no evidence that a refusal immediately to review the state court decision might seriously erode federal policy.

This Court has consistently interpreted the requirement of a "final judgment" in 28 U.S.C. § 1257(a) in a narrow manner. The Court has been especially careful to ensure that cases arising from state courts meet the final judgment rule.

> This prerequisite for the exercise of the appellate powers of this Court is especially pertinent when a constitutional barrier is asserted against a state court's decision on matters peculiarly of local concern. Close observance of this limitation upon the Court is not regard for a strangling technicality. History bears ample testimony that it is an important factor in securing harmonious state-federal relations.
>
> *Republic Natural Gas Co. v. State of Oklahoma*, 334 U.S. 62, 67 (1948).

In the context of summary judgment, this Court has applied the final judgment rule to dismiss an appeal from a state court for want of a final judgment. In *Ashland Oil, Inc. v. Rose*, 177 W.Va. 20, 350 S.E.2d 531 (1986), the West Virginia Supreme Court reversed a summary judgment concerning the retroactive effect of a state tax matter, and remanded to the trial court for further proceedings concerning the applicability of the tax in question. Ashland appealed. This Court dismissed the appeal for want of a final judgment. *Ashland Oil, Inc. v. Rose*, 481 U.S. 1025 (1987) (mem.).

For the foregoing reasons, the Court lacks jurisdiction to review the decision of the Court of Appeal. The Petition for a Writ of Certiorari should be denied.

II. THIS CASE IS UNIQUE AND THERE IS NO CONFLICT WITH ANY DECISION FROM ANY OTHER STATE OR FROM A UNITED STATES CIRCUIT COURT OF APPEALS.

The decision below and this case are unique. There is no conflict between the California Court of Appeal decision in this case and any decision from any other state or any United States Circuit Court of Appeals. That is because no entity or individual other than Petitioners would have the temerity to seek review in this Court on this record. The Yus, who never lived or worked in Virginia, accepted an unsolicited "pre- approved" credit card from Petitioners and used it for personal, family and household purposes for one year. When they became unable to continue their payments, Petitioners obtained a default judgment against the Yus in Virginia, without their knowledge, pursuant to Petitioners' "long arm" program for out-of-state credit card debtors, and garnished Mr. Yu's wages through a Virginia branch of Mr. Yu's California employer.

On the largely undisputed evidentiary record on Petitioners' motion for summary judgment, the Court of Appeal followed this Court's precedents in concluding that the Yus had established no minimum contacts with Virginia sufficient for personal jurisdiction.

Personal jurisdiction over a defendant who resides outside the forum requires under principles of due process that "he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). A defendant must have "'purposely directed' his activities at residents of the forum," *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985), "'such that he should reasonably anticipate being haled into court there.'" *Id.* at 474. And even with respect to interstate agreements, "'attenuated'" contacts with the forum are insufficient to confer personal jurisdiction. *Id.* at 475. Critically, "jurisdictional rules may not be employed in

such a way as to make litigation 'so gravely difficult and inconvenient' that a party is at a 'severe disadvantage' in comparison to his opponent." *Id.* at 478.

On the record before it, the Court of Appeal correctly concluded that it was Signet, not the Yus, who "deliberately reached out" to initiate the relationship with the Yus. (App. at 12). The Georgia Court of Appeals reached the identical conclusion in 1990 on identical facts with respect to Signet's "long arm" program. *Signet Bank/Virginia v. Tillis, supra,* 396 S.E.2d 54. (App. at 10). Requiring unsuspecting consumers like the Yus to travel thousands of miles from California to Virginia to contest a lawsuit "[t]o collect payments due on modest personal purchases,'" *Burger King Corp. v. Rudzewicz, supra,* 471 U.S. at 484-485, would "'cripple their defense'" and "unfairly enable [Petitioners] to obtain default judgments against unwitting consumers..." *Id.* at 486. The Yus are paradigm "unwitting consumers." They are people of modest means who never made purchases with their credit card in Virginia, and had no relationship with Virginia other than their credit card.

Far from creating a special class of credit card holders subject to unique jurisdictional rules, the Court of Appeal faithfully applied principles established by this Court to conclude that the Virginia default judgment "afforded no basis for the grant of summary judgment,..." (App. at 13). That conclusion conflicts with no decision from any other state or from a United States Court of Appeals. Thus, there is no basis for this Court to grant review.

III. THIS COURT HAS EXPRESSLY SANCTIONED COLLATERAL ATTACK OF SISTER STATE JUDGMENTS.

Petitioners press their prior argument that California lacks authority to determine whether the Virginia court had personal jurisdiction over plaintiffs. The Court of Appeal correctly rejected that argument. (App. at 8-9, 22). It is only where jurisdiction has

been fully and fairly litigated that a finding of personal jurisdiction must be given full faith and credit. Unbroken authority from this Court demonstrates this principle. In the leading case, *Underwriters Nat'l. Assur. v. N.C. Life & Acc., Inc., supra,* the Court held that before a court is bound by the judgment rendered in another state, it may inquire into the jurisdictional basis of the foreign court's decree. If the rendering court did not have jurisdiction over the subject matter *or* the relevant parties, full faith and credit need not be given. The Court did not put artificial bounds on this inquiry, nor did it suggest that domesticated procedures are necessary to trigger the inquiry. Rather, in determining whether full faith and credit be given, the Court ascertained that the parties were before the court below and that they fully and fairly had litigated the question. 455 U.S. at 706-707.

In this case, since the Yus never appeared in the Virginia court and personal jurisdiction there was never contested by them, they properly challenged the jurisdiction of the Virginia court in this action. There was no determination of its own jurisdiction by the Virginia court. The Court of Appeal's holding that jurisdiction was not litigated in the proceedings that resulted in the default judgment against plaintiffs is undeniably correct. (App. at 23).

As Virginia's own Supreme Court has observed, "'If a judgment is void, it may be assailed anywhere at any time in any way by anybody. It is immaterial whether the assault be direct or collateral.'" *Slaughter v. Commonwealth*, 222 Va. 787, 284 S.E.2d 824, 827 (1981), *citing Beck v. Semones' Administrator*, 145 Va. 429, 134 S.E. 677, 680 (1926). Moreover, "'the fact that the trial court decided that such service or appearance was valid could not make it so. If the service or appearance was illegal, a decision of the trial court to the contrary could not make it legal. If such were true, then the trial court could never, under any circumstances, enter a void judgment.'" *Slaughter, supra,* 222 Va. at 793, 284 S.E. 2d at 793, *citing Beck, supra,* 144 Va. at 441; *accord Kelley v. Kelley*, 248 Va. 295, 449 S.E.2d 55, 56 (1994).

Moreover, a trial court's view of its own jurisdiction is "never conclusive." *Slaughter v. Commonwealth of Virginia, supra*, 222 Va. at 793, 284 S.E.2d at 827. "The question ... is not what a trial court intended in a particular case but the preclusive effect its judgment has under the controlling legal principles of its own State." *Baker v. General Motors Corp.*, 522 U.S. 222, 118 S.Ct. 657, 671 (1998) (Kennedy, J., concurring). As the California Court of Appeal correctly noted in this case, "No Virginia appellate court has approved the exercise [by Signet or anyone else] of 'long arm' jurisdiction over out-of-state consumers for debt collection purposes." (App. at 17). Thus, it was entirely consistent with the jurisprudence from both this Court and from the Virginia Supreme Court, for the Yus collaterally to attack the void judgment of the Virginia Municipal Court in California.

This Court has held that collateral attack of sister state judgments on jurisdictional grounds is valid. Just last term, in *Baker v. General Motors Corp., supra*, the Court allowed a collateral attack in a Missouri action of an injunction entered by a Michigan court. The Court held that the Missouri plaintiffs could not be bound by the Michigan injunction because they were not parties to that action and the Michigan court, therefore, had no jurisdiction to bind them to the judgment entered in the prior action. 118 S.Ct. at 666-667. *Baker* stands for the proposition that recognition of full faith and credit is owed to underlying dispositions that the rendering state has authority to order, but not to dispositions it had no power to make. *Id.* at 667. *Baker* thus sanctioned a collateral attack on the Michigan judgment's applicability in Missouri by individuals who were not parties to the Michigan proceeding.

No interstate conflict will result from the Court of Appeal's decision. The California Court of Appeal properly rejected Petitioners' contention that its decision will lead to interstate conflict. Once an issue has been finally determined by a court with jurisdiction over both the subject matter and the parties, the decision qualifies for recognition throughout the land. (App. at 22, *citing Barquis v. Merchants Collection Ass'n of Oakland*, 7 Cal.3d 94,

120, 101 Cal.Rptr.2d 745, 764, 496 P.2d 812 (1972), and *Baker, supra*, 118 S.Ct. at 664). This recognition is required once the jurisdictional issue has been fully and fairly litigated between the parties. *Durfee v. Duke* (1963) 375 U.S. 106, 111.

However, where the first state has not litigated and decided the question the jurisdiction of a court rendering a judgment is open to inquiry, when questioned in the court of another state. The party against whom the judgment is rendered is not forced to go to the state of the rendition of a judgment for relief. *Underwriters National Assurance v. N.C. Life & Acc., supra*, 455 U.S. at 705. Thus, as the California Court of Appeal correctly held, because the Virginia court's jurisdiction has not previously been litigated between the parties, a California court was free to resolve this issue according to its own best judgment. That determination, being fully and fairly litigated between the parties in the California court, is entitled to full faith and credit elsewhere. (App. at 23).

Although the pre-*Burger King* cases of *Brown* and *Kolbe* cited by defendants at page 6 of the Petition do state that the purpose of the Virginia long arm statute is to assert jurisdiction to the extent permissible under the due process clause of the federal Constitution, that is only the beginning of the inquiry. Numerous subsequent Virginia and federal cases have interpreted the Virginia long arm statute in light of *Burger King* and other Supreme Court cases.

Generally, analysis of in personam jurisdiction under Virginia law requires two steps: first, the court must determine whether the activity of the defendant falls within the long arm statute; and second, the court must decide whether the exercise of personal jurisdiction would violate the Due Process Clause of the 14th Amendment to the U.S. Constitution. *Peninsula Cruise, Inc. v. New River Yacht Sales, Inc.* 257 Va. 315, 319, 512 S.E. 2d 560, 562 (1999).

In *Peninsula Cruise, Inc. v. New River Yacht Sales, Inc., supra*, the court cited *Kolbe* for the proposition that "it is manifest

that the purpose of Virginia's long arm statute is to assert jurisdiction over non- residents who engage in some purposeful activity in this state to the extent permissible under the due process clause." The court applied the due process part of the two-part Virginia test, citing *International Shoe v. Washington* 326 U.S. 310, 316 (1945), and *Burger King, supra,* for the requirement that maintenance of an action against a defendant may not offend "traditional notions of fair play and substantial justice." 257 Va. at 319. The circumstances of each case must be examined to ascertain whether the requisite minimum contacts are present. *Id.*, citing *Kulko v. California,* 436 U.S. 84, 92 (1978), and *Witt v. Reynolds Metals Co.*, 240 Va. 452, 454, 397 S.E.2d 873, 875 (1990).

The Virginia court upheld a finding of jurisdiction in the *Peninsula Cruise* case over a Florida corporation that had contracted to repair a boat in Florida and deliver the boat to a point in South Carolina. However, defendant's employees, for additional consideration, then agreed to deliver the vessel in Virginia and did so. The repair work was done in Virginia. The Virginia Supreme Court concluded that the defendant, by taking these actions, purposefully availed itself of the privilege of conducting business within Virginia, thereby invoking the benefits and protections of Virginia's laws and, consequently, maintenance of the action in Virginia did not offend traditional notions of fair play and substantial justice. *Id.* at 321.

Thus, Petitioners' contention that under *Kessler v. Fauquier National Bank,* 195 Va. 1095, 81 S.E. 2d 442 (1954) (Petition, p. 6 n.2), Virginia might well refuse to enforce a California judgment arising out of a dispute between the parties in this case, is both erroneous and specious. Under Virginia's own law, personal jurisdiction may be challenged at any time in any forum. *Slaughter v. Commonwealth of Virginia, supra,* 222 Va. at 787, 284 S.E. 2d at 827. It is precisely because the Yus did not challenge jurisdiction in the Virginia courts that the subsequent California determination is entitled to full faith and credit everywhere, including in Virginia.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

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Respectfully submitted,

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